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Mr. Craig Melodia
Assistant Regional Counsel
USEPA – Region 5
77 West Jackson Blvd. (C-29A)
Chicago, IL 60604-3590

Re: NSP Lakefront Site, Ashland, Wisconsin

Dear Mr. Melodia:

As you know, our firm has been retained by the City of Ashland ("City"), to represent it with respect to the above-referenced NPL site ("Site"). This letter responds to Attorney David Crass's November 20, 2009 correspondence to you ("Crass Letter") on behalf of Northern States Power/Xcel Energy ("NSP").[1] In the Crass Letter, NSP asserts that the City does not qualify for the liability exemption for involuntary acquisitions by municipalities set forth in section 101(20)(D) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and therefore should receive a special notice letter following the issuance of the Record of Decision by the EPA. We strongly disagree.

[1] While preparing this response, the City discovered information and documents not previously provided to you, which are responsive to the EPA's §104(e) request, The documents include two reports prepared by Greeley & Hansen Engineers in conjunction with construction of the Wastewater Treatment Plant ("WWTP"), and revised construction drawings for the WWTP, from the Fall of 1952. (See Exhibits F, I and J.) Accordingly, please consider this letter and those attachments as a supplemental response to the §104 (e) request.

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Specifically, NSP argues that:

1. The City does not qualify, because its acquisition was not involuntary;
2. The City's actions have caused or contributed to the contamination at the Site; and
3. A special notice letter should be issued to the City.

We respond to each of these arguments in Sections II, III and IV, below.

I. Introduction

A. Legal Framework

The statutory provision in question, sometimes referred to as the "municipal involuntary acquisition exemption," is perhaps better described as an exclusion of certain parties from CERCLA's definition of *owner or operator*. The exclusion provides that:

> The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.

CERCLA § 101(20)(D), 42 U.S.C. 9601(20)(D). The exclusion is limited, however, by the following sentence, which states:

> The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility . . . .

Id. Although CERCLA itself does not define "involuntarily," the CERCLA Lender Rule ("Lender Rule") promulgated by the EPA in 1992 clarified the agency's interpretation of what constitutes an "involuntary acquisition" or "involuntary transfer" under section 101(20)(D), and the related affirmative defense to CERCLA liability set forth in section 101(35)(A). The Lender Rule provides that:

> (a) Governmental ownership or control of property by involuntary acquisitions or involuntary transfers within the meaning of CERCLA section 101(20)(D) or section 101(35)(A)(ii) includes, but is not limited to:

> (1) Acquisitions by or transfers to the government in its capacity as a sovereign, including transfers or acquisitions pursuant to abandonment proceedings, or as the result of tax delinquency, or escheat, or other circumstances in which the government involuntarily obtains ownership or control of property by virtue of its function as sovereign . . . .

40 C.F.R. § 300.1105(a).[2] The preamble to the Lender Rule provides further clarification, stating that the terms "involuntary acquisition or transfer," mean:

> any acquisition or transfer in which the government's interest in, and ultimate ownership of, a specific asset exists only because the conduct of a non-governmental party -- as in the case of abandonment or escheat -- gives rise to a statutory or common law right to property on behalf of the government.

57 Fed. Reg. 18372 (April 29, 1992).

NSP, focusing exclusively on the words "only because," argues that "[the City's] acquisition was made voluntarily and its interest in the property arose because it chose to acquire the property without legal compulsion to do so—its interest in the property did not arise only because of the actions of Schroeder Lumber." (Crass Letter at 4.) This argument ignores both the facts, and the law, and should be rejected by the EPA.

B. The Transactions

The City acquired the land now known as Kreher Park via two separate transactions. In 1942, it acquired the larger, eastern portion of the Park (including the highly contaminated "coal tar dump" area) via tax delinquency, from Ashland County, which had taken the property by tax deed from the John Schroeder Lumber Company ("Schroeder"). The City acquired the smaller, western portion of the Park from

[2] In *Kelley v. EPA*, the U.S. Court of Appeals for the District of Columbia Circuit vacated the CERCLA Lender Rule on the ground that EPA lacked authority to enact it. 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, *American Bankers Ass'n v. Kelley*, 513 U.S. 1110 (1995). In 1996, however, Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act ("Asset Conservation Act"), which validated and reinstated section 300.1105. Pub. L. No. 104-208, § 2504, 110 Stat. 3009 (1996). EPA guidance prepared after the reinstatement of the rule provides that: "Similar to the preamble to any valid regulation, the preamble to the CERCLA Lender Rule will be looked to as authoritative guidance on the meaning of the portion of the Rule addressing involuntary acquisitions." U.S. EPA, Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (June 30, 1997).

Northland College in 1986, for the purpose of extending Ellis Avenue, and constructing a marina. The boundaries of the two acquisitions are shown on Exhibit A, which includes both current and historic aerial photos of the site.

Because the quit claim deed transferring the property from the County to the City in 1942 describes the property in terms of blocks and lots, the boundaries are drawn (in yellow) on Exhibit A as excluding the road and alley rights-of-way. In fact, the City already held an ownership interest in the roads and alleys as the result of a dedication when the land was platted in the late 19th century.[3]

The 1986 quit claim deed from Northland College to the City used a metes and bounds description, so the property acquired in that transaction is drawn (in red) as one large parcel, including the rights-of-way. It is important to note, however, that a quit claim deed can only transfer real property to which the grantor has title. Thus, the portions of the site that the City already owned (e.g., the public rights-of-way, and the east corner of the site where the two property descriptions overlap) were not actually included in the 1986 transaction. Likewise, although the 1986 boundary encompasses large portions of lakebed, all navigable waters are held in trust by the state of Wisconsin for the benefit of the public, and cannot be purchased or sold. *See,* Wis. Const. art. IX, § 1; *Muench v. PSC*, 261 Wis. 492, 53 N.W.2d 514 (1952). Therefore, in summary, the property acquired by the City in 1986 includes only those areas located above the ordinary high water mark that the City had not previously acquired.

C. Wisconsin Property Tax Law

Under Wisconsin law, assessment and collection of property taxes is a shared responsibility of the City and the County. *See, generally,* Wis. Stat. chs. 70, 74, 75. The City assesses the property, creates the tax roll and sends the tax bills. Wis. Stat. ch. 70. The City and the County both collect the taxes. Wis. Stat. ch. 74. In the event of nonpayment, the County may initiate tax delinquency proceedings, and ultimately, take the property for delinquent taxes. Wis. Stat. chs. 74, 75.

In the 1930s, the tax delinquency process was somewhat different than it is today. Each year, by the fourth Monday in April, the county treasurer was required to compile a list of all tax delinquent properties, and issue a public notice that, beginning on the second Tuesday in June, the properties would be sold at auction. Wis. Stat. § 74.33 (1931). At

[3] The City is not aware of any subsequent vacation of the original street rights-of way.

auction, the county treasurer was required to sell a portion of each property sufficient to pay the delinquent taxes. *Id.* § 74.39. If a tract of land could not be sold for the amount of the taxes, the statute provided that "the county treasurer shall bid off the same for the county for such amount." *Id.* § 74.42. In exchange for payment on the bid, the purchaser (or the county) would receive a tax certificate from the county treasurer. *Id.* § 74.46. Following a redemption period,[4] during which the tax-delinquent property owner could redeem the property by paying the back taxes with interest, the holder of the tax certificate could take the property by tax deed. *Id.* §§ 74.46, 75.01.

II. The City Qualifies for the Exemption in CERCLA §101(20)(D).

A. The City's 1942 Acquisition was "Involuntary."

In the early 1930s, Schroeder became delinquent in paying its property taxes. Ashland County Board minutes show that by 1939, the face value of the tax certificates held by the County was over $13,500, not including delinquent taxes for 1938. (Minutes, Feb. 22, 1939, pp. 147-48, Ex. B at 1-2.) The Board appointed a committee to evaluate the County's options and make a recommendation to the Board. (*Id.*) The committee determined that the Board essentially had two options: (1) take a tax deed to the property; or (2) offer the tax certificates for sale at public auction for less than face value. (*Id.*)[5] Because taking the property by tax deed would require demolition of the structures, and hiring a watchman to secure the property, the committee recommended the latter option to the County Board. (*Id.*)

Apparently, the Board disagreed with the committee's recommendation, because in March and April of 1939, the County made two apparently unsuccessful attempts to take the property by tax deed. (*See* Ex. B at 3-4.) In May, the committee reported to the County Board on the "possibility of sale or transfer of the Schroeder Mill Property, if and when the county secures a tax deed...." (Minutes, May 2, 1939, pp. 209-10, Ex. B, at 5-6.) The committee reported that it had investigated the possibility of selling the property

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[4] Until 1933 the redemption period was three years. In 1933 the statute was amended to lengthen the redemption period to five years. 1933 Laws of Wis., ch. 244.

[5] The statute at that time directed county treasurers, unless directed otherwise by the county board, to "sell and transfer, by assignment, any tax certificates held by the county to any person offering to purchase the same for the amount for which the land described therein was sold. . . ." Wis. Stat. § 75.34(1) (1937). It also prohibited sales of tax certificates held by the county at less than face value without first publishing a public notice of intent to do so in a local newspaper for four consecutive weeks. Wis. Stat. § 75.34(2).

to private parties or to the City, and had promising leads, but unanimously recommended that the county offer to sell its interest in the property for $10,000, "with the city of Ashland being given first opportunity to purchase it at that figure, the amount in the event of the city's purchase being charged against the excess roll."[6] (*Id.*) If such an offer was extended, it appears that the City must have declined to acquire the property at that price.

On July 11, 1939, the County executed a tax deed to the property (Ex. B at 7). The minutes of the next County Board meeting include the following resolution:

> WHEREAS, Ashland County has taken deed to the Schroeder Lumber Co. Mill.
>
> BE IT RESOLVED by the Ashland County Board of Supervisors that the Schroed r (sic) Mill Committee be directed to salvage the Schroeder Saw Mill property also the planing mill property at once.

(Minutes, July 26, 1939, p. 267, Ex. B at 8.) Thereafter, the County apparently initiated an action for quiet title to the property, and Schroeder contested the validity of the tax deed. (*See,* Minutes, November 14, 1939, pp. 67-69, 72, Ex. B at 9-12.) The November Board minutes and a subsequent quit claim deed show that Schroeder and the County settled the dispute on the following terms: Schroeder agreed to pay the County $8000, and execute a quit claim deed granting the County all rights to the real property, in exchange for all of the "buildings, improvements, machinery, tools and property, except for pilings, docks and subsurface material." The County also agreed to permit Schroeder to continue to occupy the premises for a period of two years. (*Id.*; Ex. B at 13-14.)

While Schroeder continued to occupy the property, the City and County apparently negotiated the terms of a transaction in which the County would transfer ownership of the property to the City. City Council minutes from August 12, 1941 state that "[t]he Mayor discussed the Schroeder Mill property stating that it would be advisable to obtain title to this property for the dilinquent (sic) taxes." (Ex. B at 15.) The Council appointed a committee to work with the corresponding County Board committee on the details of the transaction. (*Id.*) The following day, the Mayor made an offer, which was later memorialized in a February 4, 1942 letter to the County Board. (Ex. B at 16.) The letter reveals that the City offered Ashland County "an amount equal to the delinquent taxes on the property [$4,390.91] and a small adjustment [$750] in addition...." (*Id.*) The "adjustment" was further offset by $442.02 in taxes paid by the City to the County that year, leaving only a nominal cash payment of $307.98. Thus, the City took the property

[6] The "excess roll" refers to delinquent property taxes owed to the City.

from the County (primarily) in lieu of delinquent taxes. Although it did not acquire the property via a formal tax delinquency process, it nonetheless acquired the property by virtue of its function as a sovereign, as compensation for delinquent taxes.

The City and the County are both subdivisions of the State of Wisconsin, with a shared responsibility to collect property taxes.[7] The fact that title to the property passed through the County to the City does not change the facts that the *government* owns the property, and it was the private owner's failure to pay taxes, which gave rise to the government's right to acquire the property. Thus, in accordance with CERCLA section 101(20)(D), the Lender Rule and EPA guidance, the City's acquisition of the property was "involuntary," and the exemption applies.

NSP argues that the City's acquisition cannot be deemed "involuntary" because: (1) "the City did not obtain title to portions of the site through one of the mechanisms enumerated in the relevant state or federal statutes or guidance as 'involuntary;'" and (2) "the City . . . voluntarily purchased the property," with "no legal compulsion to do so." (Crass Letter at 4.) In support of its position, NSP cites two cases in which federal district courts held that municipalities were not exempt from liability under CERCLA section 101(20)(D), because they voluntarily purchased the subject properties. *See, generally, United States v. Occidental Chem. Corp.*, 965 F. Supp. 408 (W.D.N.Y. 1997); *City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153 (D. Kan. 2000).

NSP's arguments are without merit.

1. Whether or not the specific method of acquisition is listed in the statute, rule or guidance, the City's acquisition was nonetheless "involuntary."

As stated above, the City acquired the property from the County primarily in exchange for delinquent taxes remaining on the excess rolls. Both CERCLA and the Lender Liability Rule explicitly list "tax delinquency" as one of the mechanisms by which municipalities may involuntarily acquire properties. CERCLA § 101(20)(D); 40 C.F.R. §

[7] The State of Wisconsin recognizes this shared responsibility of cities and counties in a similar municipal exemption from liability under the state's "spill law." Wis. Stat. ch. 292. In addition to providing an exemption for "local government units" that acquired property directly through tax delinquency proceedings, bankruptcy, condemnation, blight elimination and escheat, it also exempts from liability a local governmental unit that "acquired the property from a local governmental unit that is exempt under this subdivision." Wis. Stat. § 292.11(9)(e), generally, and (9)(e)1m., b.

300.1105(a)(1). But whether or not the City acquired the property by one of the mechanisms specifically enumerated in the statute or rule is unimportant. Both the statute and the rule expressly acknowledge that other mechanisms not listed in the text may qualify as involuntary acquisitions. CERCLA § 101(20)(D); 40 C.F.R. § 300.1105(a)(1) (including "other circumstances in which the government involuntarily [acquires title/obtains ownership or control of the property] by virtue of its function as sovereign").

2. EPA guidance expressly permits "intentional or purposeful action" as part of an involuntary acquisition.

The preamble to the Lender Rule states, in part, that:

> It is important to recognize that some of the forms of acquisitions listed in the statute that are specifically identified as "involuntary" nevertheless require some volitional action by the government entity in order to perfect title to the property (such as acquisition by foreclosure or by a tax delinquency). Therefore it is not necessary for the government entity to be completely "passive" in order for the transfer to be considered "involuntary" for the purposes of CERCLA. . . . The general phrase "or any other involuntary transfer or acquisition" does not require that the government entity acquiring the property to (sic) do so in a completely passive fashion. Therefore the mere existence of governmental discretion with respect to the time or facts of acquisition cannot be deemed dispositive of whether an acquisition or transfer is "involuntary" within the meaning of CERCLA.

57 Fed. Reg. 18372.[8] Thus, the City's voluntary act -- accepting the property from the County in exchange for unpaid taxes -- does not disqualify it from coverage under the involuntary acquisition exemption. Provided the government's right to the property is the result of conduct by a non-governmental party, as it is here, the acquisition is "involuntary."

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[8] Another guidance document states that: "EPA ... considers a municipality's acquisition of property through tax delinquency, foreclosure or abandonment -- even if the acquisition requires some sort of discretionary, volitional action by the government -- generally to be "involuntary" for purposes of sections 101(20)(D) and 101(35)(A) of CERCLA. U.S. EPA, Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (Oct. 20, 1995).

3. The cases cited by NSP are inapposite.

The cases cited by NSP provide no support for its claim that the City of Ashland is liable for the NSP Lakefront site. *City of Wichita* arises from a contaminated site in downtown Wichita, Kansas. The Kansas Department of Health and Environment conducted a site investigation, and identified over 500 PRPs, including the Coleman Company, which operated a facility in downtown Wichita. 177 F. Supp. 2d at 1160. The City of Wichita ("Wichita") was not identified as a PRP, despite the fact that it also owned a number of properties within the site boundaries, including one that Wichita purchased from a private individual in July 1993 for $680,000, and operated as a bus barn. *Id.* at 1160, 1162.

After incurring significant response costs at the site, Wichita sued Coleman and other defendants for cost recovery and contribution, pursuant to CERCLA sections 107 and 113, respectively. *Id.* at 1158, 1161-62. The defendants brought a motion for summary judgment on the cost recovery claim, asserting that because Wichita was a liable party, or "PRP," it was not entitled to seek cost recovery. *Id.* at 1158. Wichita argued that it was exempt from owner/operator liability under section 101(20)(D). It argued that because the purchase agreement stated that the sale was "in lieu of condemnation," its acquisition of the property was involuntary. *Id.* at 1162. The court summarizes its understanding of Wichita's position as follows: "[H]ad the sale not occurred, the City would have condemned the property pursuant to its eminent domain power, and, for this reason, the City acquired the property 'by virtue of its function as a sovereign.'" *Id.* at 1167.

The court rejected this argument, stating that "[t]he City provides no authority, nor has the court found any, suggesting that a municipality's acquisition of property through the *actual* exercise of its eminent domain power is an *involuntary* acquisition 'by virtue of its function as a sovereign.'" *Id.* at 1168. As such, the court held that Wichita was not entitled to the exemption, because it had failed to offer any evidence whatsoever that its purchase of the property was "involuntary." *Id.* at 1167.

The other case, *United States v. Occidental Chemical Corp.* ("*Occidental*"), arises out of a dispute concerning the infamous "Love Canal" site in the city of Niagara Falls, New York. 965 F. Supp. at 409-10. Occidental purchased the Love Canal property in 1947, used it to dispose of over 40 million pounds of chemical wastes, and sold the property to the Niagara Falls Board of Education ("Board") for one dollar in 1953. *Id.* at 410. The transaction documents contained a provision stating that "the grantee assumes all risk and liability incident to the use [of the property]." *Id.*

In 1960, the city of Niagara Falls purchased a portion of the property from the Board, "subject to the terms [and] conditions" of the deed to the Board. *Id.* Despite the exculpatory clause in the deed to the Board, the district court had held, in a previous decision, that Occidental was jointly and severally liable for the contamination. *Id.* at 411. The decision cited by NSP addresses only Occidental's cross-claim against Niagara Falls for contribution. *Id.* at 411-12. Niagara Falls argued that it was exempt from CERCLA liability pursuant to section 101(20)(D). Specifically, the city argued that by purchasing the land for roads and a park, it was making an "involuntary" purchase because construction of roads and parks "are functions that a sovereign must perform." *Id.* at 413.

The court rejected this argument, stating that Niagara Falls "offer[ed] no authority for this construction." *Id.* The court also noted that since all municipal purchases are made for the benefit of the municipality's citizens, the city's definition of "involuntary" would cause the exemption to swallow the rule. *Id.* In other words, simply purchasing property for public use does not constitute an involuntary acquisition. *Id.*

The facts of this case are clearly distinguishable from those in both *City of Wichita* and *Occidental.* Unlike those cases, the City neither argues that it is entitled to the exemption simply because it purchased the property for a public purpose, nor because it could have acquired the property via condemnation. Rather, the City acquired the Kreher Park property from the County, which took the property by tax deed, in its capacity as sovereign, and in exchange for delinquent taxes on the excess rolls. The government's interest in, and ownership of the property arose only because the conduct of a non-governmental entity -- the taxpayer that failed to pay its property taxes – gave rise to the government's right to the property. Thus the City is exempt from owner/operator liability.

B. The property acquired by the City in 1986 is relatively clean, and is not driving the proposed remedy.

It appears that the City's purchase of the western portion of the site from Northland College was a voluntary acquisition. The part of Kreher Park acquired by the City in that transaction, however, is generally not contaminated, or significantly less contaminated than the eastern portion of the park. (See, e.g., Exhibit C, which overlays maximum PAH concentrations in soil and sediment and the transaction boundaries on a 2009 aerial photo.) Excluding samples in the rights-of-way, there is only a single location in which the maximum PAH level exceeds 1000 mg/kg in the soil. A similar pattern of contamination exists for VOC contamination, with only two or three sampling points

where VOC concentrations in the soil are greater than 1 mg/kg. (*See,* Remedial Investigation Report ("RI,") figure 5-2.) Because the soils in this area are relatively clean, and are not driving the need for remediation, the City's voluntary acquisition of this portion of site in 1986 should not disqualify the City for the exemption.

III. The City Did Not Cause or Contribute to a Release of Hazardous Substances.

NSP argues, in the alternative, that even if the City's acquisition of the property was involuntary, the City is not entitled to the exemption because its actions after acquiring the property "caused or contributed to the release or threatened release of a hazardous substance from the facility. . . ." *See* CERCLA § 101(20)(D). Specifically, the Crass Letter lists five actions which it claims have caused or contributed to a release:

- Allowing the operation of an uncontrolled waste disposal location at the site beginning in the 1940s;
- Constructing in the 1950s and expanding in the 1970s the former wastewater treatment plant;
- Transporting and disposing contaminants at the site excavated during the extension of Ellis Avenue in the mid-1980s;
- Pumping contaminated water from the WWTP to the impacted portion of the bay as late as 1997; and,
- Installing and maintaining surface and sub-surface drainage features and transport mechanisms resulting in the discharge of hazardous substances.

(Crass Letter at 5-6.)[9]

NSP's claims are simply not supported by the facts. The City's actions after acquisition of the property have not caused or contributed to the release or threatened release of hazardous substances. We refute each of NSP's allegations below.

[9] NSP has previously provided EPA with factual information that ostensibly provides support for these claims. *See, generally,* Ashland Lakefront Site PRP Investigation Report ("PRP Report") (June 20, 2006).

A. The solid waste disposal at the site did not cause or contribute to the release of hazardous substances from the facility.

NSP has presented anecdotal evidence of solid waste disposal at the site (*see, generally*, PRP Report § 3.3.1 at 15-16, Exhibit 8). Based on the vague and sometimes conflicting recollections of a few witnesses, NSP alleges that "[d]uring the City's ownership in the 1940's and 50's, the Site was used as an uncontrolled waste disposal site where open and uncontrolled dumping occurred." (PRP Report § 3.3.1, at 15-16.) In fact, at that time, the City did not own the portion of the site where most if not all of the solid waste disposal allegedly occurred, and did not acquire it until 1986.

Although site diagrams prepared by or for NSP show the "former city dump" or "former solid waste disposal area" as a large square area spanning portions of both the property acquired in 1942 and the property acquired in 1986, the test pit investigations of that area, conducted in 1994 and 2005, suggest that the waste disposal area may be smaller, and largely if not entirely limited to the parcel acquired by the City in 1986. Many of the test pits on the property acquired in 1986 (TP-1, 7, 100, 101, 102, 103, 105, 106 and 107) contained materials indicative of solid waste disposal, but only two of the test pits on the property acquired in 1942 (TP-2, 3, 4, 5, 6, 8, 104, 108, and 109), contained any materials of that nature.[10] Moreover, even if the City did dispose of solid waste on the property it acquired in 1942, there is no evidence that this activity caused or contributed to a release of *any* hazardous substances, let alone the hazardous substances of concern at this Site. Most of the eyewitness accounts and the test pit investigations suggest that the solid waste that was dumped at the Site consisted primarily of demolition debris, such as wood, brick, glass and steel. (*See* PRP Report, Exhibit 8.)

On November 20, 1997, the Wisconsin Department of Natural Resources (WDNR) issued a responsible party notification letter to the City regarding solid waste disposal at the site. (*See* Ex. D, attached.) After its investigation, the WDNR issued a "liability clarification letter" to the City on August 30, 2001, which concludes that "[t]he solid

[10] The log for TP-104 , which is located near the western edge of the 1942 acquisition, notes the presence of "wood and brick fragments." (RI at App. B3.) Wood and sawdust, of course, are ubiquitous throughout Kreher Park, from the days the area was operated as a sawmill and lumber yard, and the brick fragments could also be unrelated to dumping that occurred in the '40s and '50s. The log for TP-2, which is located in the same vicinity as TP-104, notes the presence of "Demolition Debris (e.g., bricks, concrete wire, steel pieces, bottles)" from 1 ft. to 5 ft. bgs. (*Id.*) While this material may suggest that this area was used as a waste disposal site, it could also be material remaining from the operation and demolition of the Schroeder Lumber facility.

waste and associated contamination has been investigated and the risk to human health and the environment has been adequately assessed. Based on this information, the department has determined that no investigation or remediation of this solid waste is necessary at this time." (*See* Ex. E, attached.) The EPA apparently agrees with the WDNR's assessment. The proposed remedial alternative for soil in Kreher Park is limited removal (with either off-site disposal or thermal treatment), and the installation of a low-permeability clay cap. The area in which these remedies will be implemented is limited to the historic "coal tar dump" and the immediate surrounding area, which is located entirely on the property involuntarily acquired by the City in 1942, and has nothing to do with the alleged solid waste disposal at the western end of the property. (*See* Feasibility Study ("FS") at 6-7, 6-8; Fig. 6-3A.)

Given that the WDNR has determined that the solid waste does not require further investigation or clean-up, and that the solid waste is not driving the EPA's remedy for the site, the City respectfully maintains that EPA should find that any solid waste disposal the City may have been involved in did not cause or contribute to a release or threatened release of hazardous substances.[11]

B. The City's construction and expansion of the wastewater treatment plant did not cause or contribute to a release of hazardous substances.

NSP asserts, based on little if any supporting evidence, that the construction and expansion of the wastewater treatment plant ("WWTP") on the site caused or contributed to a release of hazardous substances. (Crass Letter at 5.) The City has found no evidence that the construction or expansion of the WWTP caused or contributed to such releases. (*See, generally,* City of Ashland 104(e) Response, A6d, at 4-5; A11a, b and c, at 8.) Only one witness, Mr. Kovach, provided information about the site excavation for the WWTP. In his deposition, he described "grease and oil...mixed with water," dripping off of slabs of wood. (PRP Report, Exhibit 8, Tab O, at 9-10.) This description is consistent with the presence of MGP waste below the water table. Kovach was unable, however, to testify as to what was done with such material, and said he was not aware of any dump site located on the property. (*Id.* at 10.) He also testified that the fill material used to backfill the site during construction was "regular dirt," and "clay" hauled onto the site, not contaminated material excavated on site. (*Id.*)

[11] In the event that the EPA disagrees, and finds that solid waste disposal by the City caused or contributed to a release, the City requests that the solid waste disposal impacts be treated as a separate operable unit for the purposes of site remediation, so that any response costs associated with the solid waste can be separately apportioned.

Thus, while it is possible that some material excavated from below the water table during construction was contaminated with MGP waste, it is unclear what was done with that material. It may have been disposed of off-site, or if it remained on site, it was likely reused as fill near the site of excavation. (*Id.,* A6d at 5.) Moreover, contrary to the City's April 2009 104(e) response (*see Id.,* A11b at 8), it appears likely that only a small volume of such material was excavated. A discussion of site grading in the Final Report prepared by Greeley & Hansen following the completion of construction states that "elevations at the plant site were so low, additional fill had to be brought in to properly grade the site." (*See* Final Report at 10, attached as Ex. F.) The report further notes that 5,000 yards of clay, 675 yards of clay gravel and 400 yards of black dirt were brought into the site. (*Id.*) Thus, while it is possible that the excavation and deposition of soil on site could have caused a release of hazardous substances, there is no evidence that it did so in this case.

C. The alleged excavation and deposition of contaminated soils during the extension of Ellis Avenue did not cause or contribute to a release of hazardous substances.

NSP has alleged, based on the affidavit of Mr. Pete Carrington, that during the construction of the Ellis Avenue extension in the mid-1980s, the City excavated coal tar waste and disposed of it somewhere near the area now known as the "Seep." (PRP Report § 3.3.3, at 17.) The statements of other witnesses, however, including those of Mr. Tom Hubbard and Mr. Eder, conflict with Mr. Carrington's statements. *See* Letter from Mr. Jamie Dunn, WDNR, to Mr. Jim Musso, NSP, (Feb. 4, 1998) ("Dunn Letter") at 2 (Ex. G, attached).) Mr. Eder stated that he did not recall encountering coal tar during the Ellis Avenue extension project; Mr. Hubbard stated that the material encountered during the extension of Ellis Avenue was not coal tar, but peat material, or black organic soil, which although structurally unsuitable for a roadbed, was not contaminated. (*Id.)* According to Mr. Hubbard, that material was excavated and deposited near the east end of the current boat parking area, not at the "Seep." (*Id.)*

Moreover, samples collected during SEH's Supplemental Investigation for the WDNR detected no contamination in the area of the alleged coal tar excavation (referred to as the "Carrington Pit"). (SEH, Supplemental Investigation Report at 10-11, 15 (Mar. 1998).) Had coal tar been located there prior to the Ellis Avenue extension, some residual contamination would be expected to be present. (Dunn Letter at 2.) Further investigation of this area by the WDNR in 1997 again detected nothing that would corroborate Mr. Carrington's allegations. (*Id.)* Thus, the evidence does not support a conclusion that the

City's activities during the Ellis Avenue project caused or contributed to a release of hazardous materials.

D. There is insufficient evidence to conclude that the sump pump in the WWTP caused or contributed to a release of hazardous substances.

NSP alleges, based on limited evidence, that "pumping contaminated water from the WWTP to the impacted portion of the Bay as late as 1997" caused or contributed to a release of hazardous substances. (Crass Letter at 6.) More specifically, NSP has previously asserted that "the City of Ashland was engaged in pumping of contaminated water -- that collected in the basement of the former WWTP -- directly to Chequamegon Bay without treatment." (PRP Report, § 3.3.4 at 17-18.)

Historically, water infiltrated into the basement of the WWTP, where it collected in sumps. (City of Ashland 104(e) Response, A11e at 9.) Sump pumps installed to remove the water from the basement discharged to the headworks of the plant. (*Id.*) During the operation of the WWTP, from 1952 to 1992, no untreated water would have been discharged to the Bay, except during occasional stormwater-related overflow events. (*Id.*) When the old WWTP was mothballed in 1992, the City continued to operate sump pumps, to prevent basement flooding and ice damage. (*Id.*) Because the WWTP was not operating, water discharged from the sump pump into the headworks would have passed through the treatment structures by gravity flow, and into the Bay, without active treatment. (*Id.*)

In June of 1997, Jamie Dunn of WDNR discovered this situation and met with representatives of the City to discuss the matter. (*See* DNR Correspondence, PRP Report, at Exhibit 9.) The City believes the sump pump was shut down in mid-1997 at the WDNR's request. (*Id.*)

While it is possible, perhaps even likely, that some contaminated groundwater was pumped out of the WWTP basement by the sump pump, neither the water in the basement of the WWTP nor the alleged discharge into the lake were ever tested for the presence of contaminants. (City of Ashland 104(e) Response, A11f at 9.) Testing of groundwater samples collected from the "new seep," located near the abandoned WWTP, contained detectable levels of a number of PAHs and VOCs, including naphthalene and benzene. (PRP Report at Exhibit 9.) From this data, one might infer that the water collecting in the basement of the WWTP was also contaminated. (*Id.*)

Even if the water that infiltrated into the basement was contaminated, however, some of the VOCs would likely have volatilized, and PAHs would likely have adsorbed to surfaces as the water flowed through the treatment structures, thereby attenuating the level of contamination before the water reached the Bay. Moreover, it is not clear that discharging the water collected from the basement of the WWTP would have significantly hastened or increased the overall discharge of contaminants into the Bay, since the contaminated groundwater would likely have discharged directly into the Bay from the aquifer, had it not infiltrated into the basement.

Certainly, any contribution of contaminants from this source would have been dwarfed by the contributions from other sources, including free product in the sediments. If the WWTP outfall were a significant source of contamination, one would expect the distribution of contaminants in the sediment to reflect that. Instead, in the words of NSP's consultants, "[t]he distribution of contaminants is fairly uniform from the marina to the boat launch. This does not resemble a point source discharge, which would be expected to form a fan shape of contaminant concentrations decreasing with distance from the discharge point." (RI at 5-17.) Instead, we see the opposite. Exhibit H shows the location of the WWTP outfall[12] overlaid on a diagram depicting total PAHs in sediment and soil. If the WWTP outfall were a significant source of contaminants, you would expect to see a fan shaped distribution extending in a westerly direction from the outfall point, but no such pattern exists.

Because there is no direct evidence of contaminant discharges to the Bay, EPA should not conclude that the City's actions with respect to the WWTP sump pump caused or contributed to the release of hazardous substances from the site.

E. There is no evidence to support NSP's claim that drainage features constructed or maintained by the City caused or contributed to a discharge of hazardous substances.

NSP alleges that the City caused or contributed to a release by "installing and maintaining surface and subsurface drainage features and transport mechanisms" at the site. (Crass Letter at 6.) More specific, if unsubstantiated, allegations were included in the PRP Report. There, NSP refers to "a network of subsurface sewers or drainpipes" allegedly installed by the City, which it claims "served as transport mechanisms for

[12] Until recently, the City believed the WWTP outfall was located further to the west, approximately 200 feet from the shore. Based on the recent discovery of more recent plans (*see* Exhibit I), however, the City now believes that the outfall is located as shown on Exhibit H.

contaminants from upland areas to the impacted Bay sediments." (PRP Report § 3.3.2, at 16.) NSP fails, however, to provide any credible evidence tying the City to any such structures. As the City stated in its 104 (e) responses, it has been unable to locate any evidence whatsoever that the City installed, owned or was otherwise responsible for drainage structures at the site. In addition, a February 1949 Report on Sewage Disposal prepared by Greeley & Hansen prior to the design and construction of the WWTP includes a diagram of all city sewers, which shows no outfall to the lake between Ellis Avenue and 7th Avenue East. (Ex. J, Fig. 2.) The report also notes that "[i]ndustries located below the sanitary sewers (i.e. along the shoreline) discharge their wastes directly to the Bay," because the City operated no sewers in that area. (Ex. J at 11.)

The PRP Report also alleges, again with no supporting evidence, that the "corrugated steel culvert" depicted in Greeley & Hansen's drawings for the original construction of the WWTP in 1951-52 "was likely installed by the City and designed to drain the [Coal Tar Dump] ... directly to the Bay so as to accommodate construction." (*Id.)* In fact, the Final Report on the construction project, which was prepared by Greeley & Hansen in 1954, includes a brief section describing each part of the system that was constructed, but never mentions the installation of a corrugated pipe, culvert, or any other infrastructure intended to drain the coal tar dump. (*See* Ex. F.)

Finally, NSP refers to a "series of subterranean clay pipes or historical sewers" that "appear[] to have drained" into the former "open sewer," which, according to NSP, was "likely installed and maintained by the City as a waste disposal mechanism ...." (*Id.* 17.) Again, NSP's allegations fly in the face of all the facts. The City has no record of such pipes or sewers, and neither of the Greeley & Hansen reports—the 1949 report regarding the existing sewer system, nor the 1954 final report on the construction project—mentions any such facilities.

As for the "open sewer," the City has no information suggesting that it ever constructed or maintained the ditch, and didn't even acquire an ownership interest in that portion of the site until 1986. Moreover, in contrast to what the City stated in its April 2009 responses to the EPA's 104 (e) request, new information found in the 1949 Greeley & Hansen report indicates that the open sewer did not receive sewage via the ravine from the streets on top of the bluff. In 1949, and likely long before that time,[13] all of the sewers from the central part of the City, between 7th Ave West (Chapple Ave) and Bay

[13] According to the 1949 Greeley & Hansen report, the City's sewer system was originally constructed in 1887, and the last major extension (at that time) was completed in 1935. Given the central location of the area in question, it is likely the sewers in that area were constructed before 1935.

City Creek, flowed southeast to northwest, into a collector main running northeast beneath what is now Lake Shore Drive. That collector fed into the sewer beneath Stuntz Avenue, which flowed to the northwest and discharged into the Bay six blocks northeast of the "open sewer". (Ex. J, Fig. 2.) The area north of Lake Shore Drive between Ellis Ave. and Prentice Ave., including Fifield Place homes constructed in the 1880s and the MGP lot itself, was served by another sewer beneath St. Claire Avenue which also flowed northeast into the Stuntz Avenue sewer, and into the Bay. There were no City sewer outfalls between Ellis Ave. and Prentice Ave.

It is likely that the ditch, or "open sewer," as it is labeled on later Sanborn Maps, was constructed by one of the lumber companies that operated on the site before it was acquired by the County or the City. Since that portion of the site is located on reclaimed lakebed, it may have been quite wet and in need of drainage in order to be used for lumber storage. It is possible that the lumber company might also have installed drain tiles in the fill, which emptied into the ditch. Although the "open sewer" continues to appear on Sanborn Maps up until 1951, no ditch is visible in either the 1939 or 1951 aerial photos (*see* Ex. A), and it is possible that the Sanborn Map makers simply failed to remove the ditch from their maps after it had been abandoned.

In short, none of NSP's allegations regarding the "drainage features" onsite are supported by the evidence. The City has previously stated that it has "no record and there is no evidence to suggest that drainage pipes or culverts were created during construction or expansion of the treatment plant." (City of Ashland 104(e) Response, A11d at 9.) The notations in the Greeley & Hansen plans[14] regarding the "12″ corrugated pipe" (and the pipe marked "2" Tar - To Abandoned For Dump") appear to identify <u>existing</u> site features, <u>not</u> facilities to be installed during the construction of the WWTP. (*Id.* A8a, b, c, d at 6; A11d at 9.) As noted in the City's 104(e) response, exploratory excavations conducted in November 2001 identified a 2" diameter steel pipe, and a 12" steel pipe terminating at the foundation of the MGP building. The 2" pipe appears to have been the same line identified in the Greeley & Hansen drawings, suggesting that it was NSP or its predecessors, and not the City, who installed the pipes.

The bottom line, then, is that there is simply insufficient evidence to conclude that the City caused or contributed to a release of hazardous substances from the site.

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[14] *See* SEH, Supplemental Investigation Report (March 1998), Figs. 6 and 7.

IV. No Special Notice Letter should be Issued to the City.

Because the City acquired the Kreher Park property involuntarily, and has not caused or contributed to the release of hazardous substances from the site, the liability exemption under CERCLA § 101(20)(D) applies. In its closing paragraph, the Crass Letter correctly quotes EPA's notice letter guidance, which states that: "special notice letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under § 107 of CERCLA." U.S. EPA, Interim Guidance on Notice Letters, Negotiations, and Information Exchange 18 (Oct. 19, 1987). Here, because there is not sufficient evidence to make such a determination regarding the City, the EPA should not issue a special notice letter.

Very truly yours,

Daniel P. Gustafson

DPG/lsh
Enclosures – Exhibits A-J on CD-ROM
cc: Thomas A. Benson
John Robinson
William Fitzpatrick
James Dunn
Daniel Graff
Brian Knapp
Peter Mann
Richard Yde